

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

E. SCOTT BRADLEY  
*JUDGE*

SUSSEX COUNTY COURTHOUSE  
1 The Circle, Suite 2  
GEORGETOWN, DE 19947

March 2, 2006

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Department of Justice  
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**RE: State of Delaware v. James Jenkins**  
**Def. ID # 0409007336**

Date Submitted: December 12, 2005

Dear Counsel:

This is my decision on the Motion for a New Trial filed by defendant James Jenkins ("Jenkins"). I have denied Jenkins' motion for the reasons set forth herein.

**STATEMENT OF THE CASE**

Jenkins was charged with Possession With the Intent to Deliver Cocaine, Possession of Drug Paraphernalia, Resisting Arrest, Maintaining a Vehicle for Keeping Controlled Substances, Failure to Signal, and Reckless Driving. The charges arose out of an encounter between Jenkins and the Seaford Police at the Seaford Meadows apartment complex on September 9, 2004. Jenkins drove his car into the apartment complex on that day. When he saw two Seaford Police officers in a marked police car, Jenkins stopped his car, turned around, and quickly drove out of the complex. Jenkins drove a short distance and then re-entered the same complex at a different entrance. He pulled up to apartment unit 76, got out of his car, ran into the apartment and then out the back door with two police officers in pursuit. Jenkins jumped a fence and ran into the woods. On the other

side of the woods, police officer Thomas Lee (“Lee”) was waiting. Lee saw Jenkins come out of the woods with a white object in his hand. When Jenkins saw Lee, he ran behind a shed. Lee saw Jenkins make a “throwing motion” to the corner of the shed. Jenkins was then apprehended by Lee and another police officer. Lee walked over to the shed and found several baggies of cocaine. The police searched Jenkins and found \$663. After a two-day jury trial, Jenkins was found guilty of the lesser-included offense of Possession of Cocaine and the other five offenses. The State of Delaware (the “State”) was represented at trial by Deputy Attorney General David Hume, Esquire (“Hume”). Jenkins was represented at trial by Stephanie A. Tsantes, Esquire (“Tsantes”). Jenkins’ motion is made pursuant to Superior Court Criminal Rule 33 and is based on alleged prosecutorial misconduct regarding improper statements made by Hume during his closing argument. This rule states, in applicable part, that the “court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice.”

## **DISCUSSION**

Jenkins argues that Hume committed prosecutorial misconduct by making three improper statements during his closing argument. The first was Hume’s mention of the “unexplained money” that Jenkins had when he was arrested. The second was Hume’s statement that Tsantes had during her closing argument put a “spin” on Detective Dan Wright’s (“Wright”) testimony. The third was Hume’s characterization of Tsantes’ closing argument as the “shotgun approach.” Jenkins argues that these improper statements shifted the burden of proof to him, improperly commented on his right to remain silent, and belittled Tsantes’ closing argument.

Having concluded at trial that Hume's comments were improper,<sup>1</sup> the next step for me is to perform a four-step analysis to determine whether Jenkins should get a new trial. I must consider (1) the closeness of the case, (2) the centrality of the issue affected by the alleged error, (3) the steps taken to mitigate the effects of the error,<sup>2</sup> and (4) whether the prosecutor's statements are repetitive errors that require reversal because they cast doubt on the integrity of the judicial process.<sup>3</sup>

### 1. "Unexplained Money"

Jenkins argues that Hume's reference to "unexplained money" in his closing argument improperly shifted the burden of proof from the State to him. He also argues that Hume improperly commented on his right not to testify at trial. In discussing the amount of money Jenkins had on his person when he was arrested, Hume stated:

"Ladies and gentlemen of the jury, let's figure out what denominations Mr. Jenkins had that day. Mr. Manogue says he gave him the highest denominations possible, three one-hundred-dollar bills, and another fifty. Now we are at three fifty. Peel off a couple of twenties, and we are at three ninety-seven. And while we are at it, Mr. Jenkins had a hundred dollars from the ATM, five twenties. Again, this is what Mr. Jenkins has left: A couple of fifties, three twenties, and some singles. Where does it come from? This is unexplained money. It is drug money."<sup>4</sup>

The State argues that both parties presented evidence as to the source of the \$662 and that

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<sup>1</sup>A prosecutor should not: (i) express personal belief as to the credibility of witnesses; (ii) misrepresent the evidence presented at trial; (iii) comment on the fact that a defendant exercised the right to remain silent; (iv) denigrate the role of defense counsel; (v) misrepresent the legal effect of defendant's statements; (vi) appeal to the jury's sense of personal risk or the level of safety in the community; or (vii) attempt to inflame the prejudices of the jury by name-calling or other pejorative language. *Hunter v. State*, 815 A.2d 730, 735 (Del. 2002) quoting *Bennett v. State*, 164 A.2d 442, 446 (Del. 1960).

<sup>2</sup> *Hughes v. State*, 437 A.2d 559 (Del. 1981).

<sup>3</sup> *Hunter v. State*, 815 A.2d 730, 733 (Del. 2002).

<sup>4</sup> Transcript at B-11.

Jenkins simply had more money in his possession than could be explained by the evidence. Thus, according to the State, Hume's reference to "unexplained money" merely created an inference that Jenkins had obtained the money by selling cocaine and that this supported the State's argument that Jenkins possessed the cocaine with the intent to deliver it. I dealt with the matter by giving the jury the following curative instruction:

"Ladies and gentlemen, I just want to clarify one thing. The State has characterized this money as 'unexplained money' and, therefore, it must be drug money. It is probably more appropriate to say that the State's position is that this money is not explained by the records that you have seen in evidence. I do want to remind you that the State has the burden of proof in this case. The State must prove every element of every offense charged beyond a reasonable doubt. The defendant has no obligation to come in here and prove anything, and he doesn't have to come in here and prove where his money came from, for that matter. So with that comment, you may consider all of that. Go ahead, Mr. Hume."<sup>5</sup>

## 2. "Spin"

Jenkins argues that Hume's characterization of a portion of Tsantes' closing argument as "spin" improperly shifted the burden of proof from the State to him. He also argues that Hume's comment was a personal attack on Tsantes that denigrated her obligation and ability to zealously defend him. Regarding this, Hume stated:

"Finally, Ms. Tsantes talked to you about Detective Wright and that ten previous times he has testified as an expert, he has testified that the defendant possessed it with intent to deliver. Again, this is what I talked about the spin. The defense is putting a spin on this."<sup>6</sup>

Hume's use of the word "spin" was in reference to Tsantes' attempt to discredit Wright. Tsantes pointed out in her closing argument that Wright had testified in ten previous trials, and in

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<sup>5</sup>Transcript at B-13.

<sup>6</sup> Transcript at B-31.

each trial he testified that the defendant had possessed the drugs with the intent to deliver them and not for personal use. It was Tsantes' inference that, irregardless of the facts, Wright always testified that the drugs were possessed with the intent to deliver them. I dealt with this matter by giving the jury the following curative instruction.

“Ladies and gentlemen, Mr. Hume, in his closing, a couple of times used the word ‘spin’ in reference to the defense argument about evidence. Frankly, ‘spin’ may have some negative connotations. I am going to direct you to disregard Mr. Hume’s reference to ‘spin’. Both the attorney for the State and the defendant are entitled to vigorously argue what they believe the evidence should mean. Ultimately, you will be the decision-maker regarding what the evidence means, but just disregard all those references to ‘spin’.”<sup>7</sup>

### **3. “Shotgun Approach”**

Jenkins argues that Hume’s characterization of Tsantes’ closing argument as a “shotgun approach” during his closing argument improperly shifted the burden of proof from the State to him.

In discussing Tsantes’ closing argument, Hume stated:

“Ladies and gentlemen, Ms. Tsantes just talked to you about the defense in this case. The defense, in a nutshell, is this: The defendant never had cocaine. That’s not the whole defense because Ms. Tsantes just told you more. The defense submits that the defendant did not have cocaine, but if he did, it is not possession with intent to deliver. That’s a shotgun approach. He can’t have it both ways. This is ‘throw it against the wall and see what sticks.’ ‘The defendant didn’t have it, but if you find that he did, then it is not the possession with intent.’ That is the shotgun approach.”<sup>8</sup>

Hume’s statement was made in reference to Tsantes’ argument that Jenkins did not possess the cocaine and that if the jury should find that he did, then he certainly did not possess it with the intent to deliver it. The State argues that Hume was merely pointing out the inherently conflicting defense theories put forth by Jenkins. I dealt with the matter by giving the jury the following

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<sup>7</sup>Transcript at B-34.

<sup>8</sup> Transcript at B-23.

curative instruction:

“Ladies and gentlemen, I have one brief comment, and then you will get the case for your consideration. Mr. Hume said when he started rebuttal, that the defense had taken the ‘shotgun’ approach and that the defendant could not have it both ways. That was in reference to the defense argument that the State had not proven that the defendant even possessed the cocaine. And the corollary to that was that if you do find that the State has proven that the defendant possessed the cocaine, the defense argument was that the State has not proven that the defendant possessed that cocaine with intent to deliver it. I do remind you, ladies and gentlemen, that the State has the burden of proof of every element of every offense. The defendant has no burden of proof. It is certainly appropriate and, quite frankly, it is prudent for the defendant to argue that the State has not met its burden of proof on every single element. That is what the defense has done in this case, and that is not unusual.”<sup>9</sup>

All three of Hume’s statements dealt one way or another only with the charge of Possession With the Intent to Deliver Cocaine. In each instance, I gave the jury a curative instruction. This case was a close call as to the delivery charge and Hume’s statements all dealt with the issue of intent, which was the critical element of that charge. However, the jury found Jenkins not guilty of this offense and guilty of the lesser-included offense of Possession of Cocaine.

Hume made no improper comments regarding the charges of Possession of Cocaine and Maintaining a Vehicle for Keeping Controlled Substances. It was not, given Jenkins’ behavior and the eyewitness testimony, a close case as to these two charges. Jenkins behavior was very suspicious. He fled in his car as soon as he saw two police officers in a marked police cruiser. Jenkins tried to get away by abandoning his car and running through a stranger’s apartment and into the woods. Lee testified that he saw Jenkins come out of the woods with a white object in his hand. When Jenkins saw Lee, he ran over to the shed and, according to Lee, made a “throwing motion” to the corner of the shed. Lee testified further that after Jenkins was arrested that he found several

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<sup>9</sup>Transcript at B-36.

baggies of cocaine by the shed. Tsantes attacked Lee's testimony by pointing out that another police officer's written report did not include all of Lee's testimony. Nevertheless, the jury found Jenkins guilty of these two offenses. However, the jury's guilty verdict on these two offenses was untainted by Hume's comments and is supported by the evidence.

Thus, I have concluded that Hume's improper comments had no effect on the outcome of the case and did not deprive Jenkins of a fair trial because the jury was obviously not swayed by them as evidenced by the jury's not guilty verdict on the delivery charge. I have also concluded that Hume's statements did not cast doubt on the integrity of the judicial process because they were few in number and ignored by the jury.

### **CONCLUSION**

Jenkins' Motion for a New Trial is denied for the foregoing reasons.

**IT IS SO ORDERED.**

Very truly yours,

E. Scott Bradley